In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-433

JAMES B. KENDRICK, ETC., and JOHN J. VASSEN,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The sole question raised by the petition is whether an Internal Revenue summons was enforceable in the circumstances of this case without the issuance of a "second inspection" notice under Section 7605 (b) of the Internal Revenue Code of 1954.

The summonses in question were issued to petitioners demanding the production of documents relating to the motor fuel excise tax liability of Ken-

drick Cartage Company (Kendrick) and United Construction Company (United). The district court refused to enforce the summonses with respect to the records of both corporations for the years 1969, 1970 and 1971 and the records of United for the year 1965. The district court concluded that because these records had previously been inspected by the Internal Revenue Service in the course of income tax audits of the taxpayers, compliance with these summonses, issued in connection with an ongoing excise tax examination, was not required unless the Service issued a second inspection notice under Section 7605 (b) of the Code. The court of appeals reversed, holding that the second inspection notice requirement did not apply to these excise tax inspections because the prior examination of petitioners' records had been concerned only with petitioners' income tax liability.

Section 7605(b) of the Code provides that "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the * * * [Commissioner], after investigation, notifies the taxpayer in writing that an additional inspection is necessary." As this Court pointed out in *United States* v. *Powell*, 379 U.S. 48, 56, the second inspection notice provision is designed to prevent revenue agents from harassing taxpayers with unnecessary examination by "requiring such agents to clear any repetitive examination with a superior."

Here, the court of appeals correctly concluded that the second inspection rule of Section 7605(b) was inapplicable. The first inspection by the Internal Revenue Service of petitioners' records was in connection with petitioners' income tax liability. However, the summonses in question were issued as part of an audit of the excise tax liability of Kendrick and United. In no sense, therefore, was the excise tax audit repetitive or unnecessary since there had never been a completed excise tax examination of the summoned records.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 596986 114